THE PRESIDENT'S WAR POWER AND AN IMPERIAL TARIFF.

BY THE HON. PERRY BELMONT, FORMERLY UNITED STATES MINISTER TO SPAIN.

THE result of the exercise by the President of what is known as "the war power" is daily becoming more evident. Heretofore "the United States" has embraced all the States, the District of Columbia and the Territories. The words "throughout the United States," which are used in the Constitution, have long been taken to mean "within the United States, or any place subject to their jurisdiction." That phrase is employed in the Thirteenth Amendment, but there is now an effort to regard "the United States" as confined to our forty-five States, and, although existing statutes have extended the Constitution over all our organized territories, there is a persistent attempt to place our newly acquired islands outside the United States and the "Union." If we can make a safe inference from the writings of their leading professors, even our universities and colleges are taking sides in the controversy; Harvard, Cornell and the University of Pennsylvania insisting that the Constitution protects only States, and that Congress is as supreme over our new islands as is the British Parliament over its colonies and dependencies, while Yale and Columbia take a different view.

The United States had outlying possessions described as territories when the treaty of peace was concluded with England. The Constitution provided for them. Later other outlying possessions came by cession from France, Spain, Mexico and Russia. All have been embraced by the words "United States." In 1853, the Supreme Court declared that "after the ratification of the Mexican treaty, California became a part of the United States." If the decision does not in principle

cover our new islands, it must be because of the difference in the language of the two treaties of 1848 and 1898. The Mexican treaty declared: "The Mexicans who, in the territories aforesaid, shall not preserve the character of citizens of the Mexican Republic conformably with what is stipulated in the preceding article shall be incorporated into the Union of the United States, and be admitted at the proper time (to be judged of by the Congress of the United States) to the enjoyment of all rights of citizens of the United States, according to the principles of the Constitution." The recent Spanish treaty declared "the civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress." Has the recent treaty made the precedents set by the Supreme Court inapplicable to Puerto Rico and the Philippine Islands? The words "United States" have, as used in the Constitution, two meanings: one, the political corporation, the body politic, the Government now at Washington; the other refers to the States, the District of Columbia and the Territories. Since the inauguration of President McKinley there has been an enormous extension of Executive power. What went on during a previous administration while President and Congress were contending over the question of recognizing the insurgent Cubans as belligerents, may have accustomed the country to look on the Executive as a chief source of power in the Spanish question then impending.

During all the annoyances of the last half-century endured by the United States from Spain in Cuba, England has headed or united with the concert of Europe to resist our intervention. England warned President Grant against doing exactly what President McKinley did twenty-three years afterward. In 1898 England changed her policy, and when armed hostility against Spain began, the prerogative of our Executive known as the "war power" was brought into use which, as the President said in his recent annual message, only Congress can end, even after peace has returned. These were his words: "Until Congress shall have made known the formal expression of its will, I shall use the authority vested in me by the Constitution and the statutes to uphold the sovereignty of the United States in those distant islands, as in all other places where our flag rightfully floats." That adroit language has put on Congress the responsibility of continuing the supremacy of military rule.

The President is always, in peace or in war, Commander-in-Chief of the Army and Navy, but when war exists there flows into his hands new powers and duties. Over what is embraced within a military occupation, or a conquest, the President is supreme. During the War of 1812 serious questions of "war power" on land did not arise. But during the Mexican War they did. Mr. Marcy, Secretary of War, ordered Colonel Kearny to occupy California and to organize a temporary military government. The treaty of peace with Mexico was proclaimed in 1848. Congress in 1849 extended the revenue laws over California. Owing to delays created by the slavery question, California was never organized as a Territory, and was finally admitted into the Union as a "State" in 1850. California had been governed under the President's "war power," but the *de facto* government then existing was continued till Congress legislated, and Marcy declared that the President will, "of course, exercise no powers inconsistent with the provisions of the Constitution of the United States, which is the supreme law for all the States and Territories of our Union." The exercise of such "war power" was then so novel that the Whig majority in the House bombarded the Executive with resolutions inquiring where the President obtained constitutional authority to govern California.

Excepting by the declaration of war against Spain, the voting of men and money therefor, the ratification of the treaty and appropriating twenty millions of dollars, Congress has had little to do with initiating and executing the policy which has resulted in the new problems referred to by the President in his Annual Message. The record of the written debates between the plenipotentiaries of the negotiating nations makes it indisputable that when the President executed the August Protocol, his judgment was in suspense regarding the future of the Philippines. There was ample time to convene the Senate, but the treaty was concluded by the President on his official responsibility. That was his prerogative right. He could not make a treaty binding on the United States till two-thirds of the Senators had consented to it, but it would not, under all the circumstances, have been easy for the Senate to reject the treaty with Spain which had been already signed. When it had been ratified the House was morally bound to vote an appropriation of the needed twenty millions. It may fairly be said that by sending to Paris as his plenipotentiaries three ex-

perienced, able and trusted Senators, the President took the Senate into the negotiations. His plenipotentiaries must, in theory, obey him, even when they are Senators, and in voting as Senators on ratification, it is improbable that they would repudiate their own work as negotiators.

Those who now examine the official papers emanating from the President, to which publicity has been given, and which assign reasons for the Protocol of August, 1898, and for the treaty itself, must be impressed by the sterility of information therein contained. The Constitution has not been violated, but how omnipotent has been the Executive during nearly two years!

II.

The natives of the ceded islands were transferred to the United States without their consent, and a phrase in the Declaration of Independence is used as a ground for criticism of the treaty. Some modern treaties have contained stipulations for obtaining such consent; but, in general, the engagements in treaties of transfer have only gone so far as to give the inhabitants time and right to decide to remain in the ceded country, or to depart therefrom. Such engagements existed in the cessions to the United States by France, Spain and Mexico. The free white inhabitants remaining were to be citizens of the United States, and the territories ceded were to be, in due time, admitted into the Union as States, according to the principles of the Constitution. That was deemed a compliance with the requirement regarding "consent of the governed." The recent treaty with Spain was negotiated on a different basis, compelled probably by the conditions existing in the Philippine Archipelago. The Spanish plenipotentiaries insisted on a stipulation that the natives should, like those born in Spain, have a right to choose their nationality. In the twenty-first Protocol they appear as saying:

"The American Commission refuses to acknowledge the right of the inhabitants of the countries ceded or relinquished by Spain to choose the citizenship with which, up to the present, they have been clothed, and nevertheless this right of choosing, which is one of the most sacred rights of human beings, has been constantly respected since the day on which man was first emancipated from serfdom. This sacred right has been respected in treaties of territorial cession concluded in modern times."

To that the American plenipotentiaries replied:

"An analysis of this article will show that Spanish subjects, natives

of Spain, are allowed a year's time in which, by the simple process of stating in a court of record their intention so to do, they may preserve their allegiance to Spain. Such persons have the fullest right to dispose of their property or remove from the territory, or, remaining, to continue to be Spanish subjects, or elect the nationality of the new territory. As to natives, their status and civil rights are left to Congress, which will enact laws to govern the ceded territory. This is no more than the assertion of the right of the governing power to control these important relations under the new Government. The Congress of a country which never has enacted laws to oppress or abridge the rights of residents within its domain, and whose laws permit the largest liberty consistent with the preservation of order and the protection of property, may safely be trusted not to depart from its well-settled practice in dealing with the inhabitants of these islands. It is true that the Spanish Commissioners propose an article on the subject of nationality supplementing the one offered by them as to nationality of Spanish subjects, which provides that all inhabitants of the ceded territory other than Spanish subjects shall have the right to choose the Spanish nationality within one year after the exchange of ratification of the treaty. This would permit all the uncivilized tribes which have not come under the jurisdiction of Spain, as well as foreign residents of the islands, to elect to create for themselves a nationality other than the one in control of territory, while enjoying the benefits and protection of the laws of the local sovereignty. This would create an anomalous condition of affairs leading to complications and discord important to avoid."

There is still a valid reason why Congress should execute the treaty in a way to give the natives the rights of "life, liberty and the pursuit of happiness," the treaty definitely excluding the exercise of the President's "war powers" in the determination of those civil rights. Halleck, in the chapter of his International Law on "The Rights of Complete Conquest," points the way. He says that the rule of public law with respect to the allegiance of the inhabitants of a conquered territory is no longer to be interpreted as absolutely unconditional, acquired by conquest or transfer, and handed over by treaty, as a thing assignable by contract and without the consent of the subject. If the inhabitants of the ceded territory choose to leave it on its transfer, they have, in general, the right to do so. He then quotes from a decision of Chief Justice Marshall:

"On the transfer of territory the relations of its inhabitants and the former sovereign are dissolved. The same act which transfers their country transfers the allegiance of *those who remain in it.*"

"This rule," Halleck says, "is the most just, reasonable and convenient which could be adopted. It is reasonable on the part of the conqueror who is entitled to know who become his subjects

and who prefer to continue aliens; it is very convenient for those who wish to become the subjects of the new State; and it is not unjust toward those who determine not to become its subjects. According to this rule, *domicile,* as understood and defined in public law, determines the question of transfer of allegiance, or rather is the rule of evidence by which that question is to be decided."

III.

Under the Constitution, "no money shall be drawn from the Treasury, but in consequence of appropriations made by law, and a regular statement and account of the receipts and expenditures of all public money must be published from time to time." All money received by tax gatherers, or collectors of customs, must, in time of peace, be paid into the Treasury of the United States, and can only be expended by an appropriation by Congress, to be examined and certified by the proper accounting and auditing officers of the Treasury. The power to modify tariff laws was committed to Congress.

The danger of pressure by importers and tax payers upon the Executive was deemed too great to permit any discretion to be lodged there. Since April 11, 1899, and for some time before that, the power to levy duties on merchandise imported into our new islands, and internal taxes therein, has been exercised by the War Department, and the rates of those import duties and taxes varied to suit the pleasure of the Executive. Executive orders under the "war power" to that effect have been made applicable in Cuba, in Puerto Rico and in the Philippine Islands. The following is a sample:

"War Department, Washington.
"July 13th, 1898.

"The following Order of the President is published for the information and guidance of all concerned:

"Executive Mansion, July 12th, 1898.

"By virtue of the authority vested in me as Commander-in-Chief of the Army and Navy of the United States of America, I do hereby order and direct that upon the occupation and possession of any ports and places in the Philippine Islands by the forces of the United States, the following tariff of duties and taxes to be levied and collected as a military contribution, and regulations for the administration thereof shall take effect and be in force in the ports and places so occupied. Questions arising under said tariff and regulations shall be decided by the General in Command of the United States forces in those islands.

"Necessary and authorized expenses for the administration of said

tariff and regulations shall be paid from the collections thereunder. Accurate accounts of collections and expenditures shall be kept and rendered to the Secretary of War.

(Signed) "William McKinley.

"Upon the occupation of any ports, or places, in the Philippine Islands by the forces of the United States the foregoing order will be proclaimed and enforced.

(Signed) "R. A. Alger, Secretary of War."

The Republican leaders are restive under the obligations imposed by the Constitution regarding duties to be levied in the ports of the United States on the American Continent upon imports from our new islands. Those who negotiated and ratified the treaty with Spain should have considered that. There is a way by which those who dread the effect upon certain voters of conceding free trade between the before-mentioned ports can perhaps avoid the anticipated political consequences to themselves. They might promote a suit which should carry the question to the Supreme Court for a prompt judgment. Unless the precedents in previous cases should be set aside, the result must be that absolute free trade has existed since April 11, 1899, and that such free trade cannot be prevented by Congress unless our new islands shall again become foreign territory, which is inadmissible.

IV.

There have been suggested these three ways of Congressional dealing with Puerto Rico and the Philippines:

First. A concession to the natives of powers of self-government and home rule, with independence more or less qualified under Congressional supervision.

Second. Ruling the islands as colonies in the way Great Britain rules her dependency, India, and her Crown colonies, on the theory of an unlimited power in Congress to govern them under the recent treaty as a peculiar estate outside the Constitution and the Union.

Third. Assimilation of the new islands to the conditions of New Mexico, for example, and governing them as our territories are now governed.

The first plan is sternly condemned by the President in his late Annual Message. He has not distinctly commended any other plan, but what he said plainly indicated his preference for a continuance of his "war power"—"belligerent right"—as he describes it.

The second plan is the favorite of Republican leaders.

While the President is reticent, his present Secretary of War, appointed on account of his learning and wisdom in matters of Constitutional law, has, in his recent Annual Report, spoken definitely, clearly and concisely. The following is what he said:

"I assume, for I do not think that it can be successfully disputed, that (1) all acquisition of territory under this treaty was the exercise of a power which belonged to the United States, because it was a nation, and for that reason was endowed with the powers essential to national life, and (2) that the United States has all the powers in respect of the territory which it has thus acquired, and the inhabitants of that territory, which any nation in the world has in respect of territory which it has acquired; that (3) as between the people of the ceded islands and the United States the former are subject to the complete sovereignty of the latter, controlled by no legal limitations except those which may be found in the treaty of cession; that (4) the people of the islands have no right to have them treated as States, (5) or to have them treated as territories previously held by the United States have been treated, or (6) to assert a *legal* right under the provisions of the Constitution which was established for the people of the United States themselves, and to meet the conditions existing upon this continent, or to assert against the United States any legal right whatever not found in the treaty.

"(7) The people of the ceded islands have acquired a *moral* right to be treated by the United States in accordance with the underlying principles of justice and freedom, which we have declared in our Constitution, and which are the essential safeguards of every individual against the powers of government, not because those provisions were enacted for them, but because they are essential limitations inherent in the very existence of the American Government. To illustrate: (8) The people of Puerto Rico have not the right to demand that duties should be uniform as between Puerto Rico and the United States, because the provision of the Constitution prescribing uniformity of duties throughout the United States was not made for them, (9) but was a provision of expediency, solely adapted to the conditions existing in the United States upon the continent of North America; (10) but the people of Puerto Rico are entitled to demand that they shall not be deprived of life, liberty or property without due process of law, that private property shall not be taken for public use without compensation, that no law shall be passed impairing the obligation of contracts, etc., because our nation has declared these to be rights belonging to all men. (11) Observance of them is a part of the nature of our government. (12) It is impossible that there should be any delegation of power by the people of the United States to any legislative, executive, or judicial officer, which should carry the right to violate these rules toward any one anywhere; and there is an implied contract on the part of the people of the United States with every man who voluntarily submits himself or is submitted to our dominion that they shall be observed as between our government and him, and that in the exercise of the power conferred by the Constitution upon Congress, 'to dispose of and make all needful rules and regulations respecting

the territory or other property belonging to the United States, Congress will hold itself bound by those limitations which arise from the law of its own existence."

For convenience the foregoing has been divided by numerals.

In the debate over the purchase and government of Louisiana, every question of constitutional law was considered that has been presented by the acquisition of our new islands. Democrats argued that Federalists played upon words when they endeavored to discriminate between the *inherent* powers of a "nation" of States united, and the Government at Washington created by the Constitution.

A quarter of a century after the chaos of opinions over such arguments, the Supreme Court, by the luminous pen of Marshall, brought order out of disorder. He said of the inhabitants of Florida:

"They do not share in the government till Florida shall become a State. In the meantime, Florida continues to be a territory of the United States governed by virtue of that clause in the Constitution which empowers Congress '*to make all needful rules and regulations respecting the territory or other property belonging to the United States.*' Perhaps the powers governing a territory belonging to the United States which has not, by becoming a State, acquired the means of self-government, may result necessarily from the fact that it is not within the jurisdiction of any particular State, and is within the power and jurisdiction of the United States. The right to govern may be the inevitable consequence of the right to acquire territory. Whichever may be the source whence the power is derived, the possession of it is unquestioned."

As to Secretary Root's first proposition, it is not to be denied that our treaty-making power could and did acquire our new islands, but that treaty-making power had the needed authority therefor, not because the United States constitute a "nation," but because it was imparted by the second article of the Constitution.

Of the second proposition, it is clear that the Government at Washington is sovereign and independent in its domestic as well as its foreign affairs, with absolute and exclusive authority within its own territory, which embraces the right to make such fundamental law and such statutes as it pleases, but the pending question is whether or not our existing Constitution restrains Congress in the execution of the last clause of the ninth article of the Paris Treaty.

The third proposition recognizes that question. As sovereignty is the power to govern, the people of the ceded islands are, by the treaty, under the sovereignty of the United States. Its ninth

article stipulates that the civil rights and political status of the natives thereof shall be determined by Congress, but that stipulation has not ousted all control by the Constitution over Congress when making its determination.

The fourth may be agreed to, and as to the fifth, the natives under the treaty have no right to demand anything except that Congress "determine" their civil rights and political status, but the voters of the United States may insist that the new islands shall be treated by Congress as other territories of the United States, including those ceded by France, Spain and Mexico, have been treated.

As to the sixth, the preamble of the Constitution declares it to be established "for ourselves and our posterity." It makes no mention of conditions existing on this continent, excepting that it had been framed "for the United States of America." The last clause of the sixth proposition takes us around in a circle to the old question of the power of a treaty to modify the fundamental law of the existence of our Government.

Up to this point the Secretary of War has contended that our Constitution does not extend over the natives of the new islands, and they cannot appeal to it, but in the seventh proposition he concedes they can appeal to it on the ground of morals. How and why in regard to moral rights if not legal rights? Could the Supreme Court pronounce unconstitutional a determination by Congress of the civil rights and political status of the natives which would violate their moral rights?

The eighth and ninth proposition affirm that the first clause of the eighth section of the First Article of the Constitution is only to be enforced "upon the Continent of North America," and therefore a higher or lower rate of duties on similar imports can be collected in the ports of Puerto Rico and the Philippines than in the port of New York, although the Constitution declares that "all duties, imposts and excises shall be uniform throughout the United States."

The eighth and ninth propositions also raise the inquiry whether or not the Constitution compels absolute free trade between our new islands and our ports on the North American Continent, and at its threshold stands the now well-known Supreme Court case of Loughborough *vs.* Blake, declaring that "our territories are a part of our society in a state of infancy, looking for-

ward to a complete equality as soon as a state of manhood is obtained." The question involved in that case was the meaning of the phrase "throughout the United States," and these were Marshall's words:

"The eighth section of the first article gives to Congress the 'power to lay and collect taxes, duties, imposts and excises' for the purposes thereinafter mentioned. This grant is general without limitation as to place. It consequently extends to all places over which the Government extends. If this could be doubted, the doubt is removed by the subsequent words, which modify the grant. These words are: 'But all duties, imposts and excises shall be uniform throughout the United States.' It will not be contended that the modification of the power extends to places to which the power itself does not extend. The power then to lay and collect duties, imposts and excises may be exercised, and must be exercised, throughout the United States. Does this term designate the whole or any particular portion of the American empire? Certainly this question can admit of but one answer. It is the name given to our great Republic, which is composed of States and Territories. The District of Columbia or the territory west of the Missouri is not less within the United States than Maryland or Pennsylvania; and it is not less necessary, on the principles of our Constitution, that uniformity in the imposition of imposts, duties and excises should be observed in the one than the other. Since, then, the power to lay and collect taxes, which include direct taxes, is obviously coextensive with the power to lay and collect duties, imposts and excises, and since the latter extends throughout the United States, it follows that the power to impose direct taxes also extends throughout the United States."

That is a clear judicial precedent, and later there was an executive precedent which should now appeal with great force to the War Department. The Whigs in Congress, during and after the Mexican War, annoyed the Polk Administration with numberless inquiries respecting its power to tax imports into California and to lay taxes in New Mexico after peace with Mexico had been proclaimed in July, 1848. Robert J. Walker was then at the head of the Treasury Department, and he informed the collectors of customs that, by the treaty of peace with Mexico, "the Constitution of the United States is extended over" California, and customs duties there applied according to the rates of the tariff law of 1846.

At that time, an illustrious New Yorker was at the head of the War Department who was, like its present chief, an eminent lawyer, and there was also in military command over California General Persifer Smith, reputed as wise a lawyer as he was efficient in the control of a military department. Marcy held that on the conclusion of the treaty of peace with Mexico, the military govern-

ment which had been established in California "under the laws of war, ceased to derive its authority from this source of power." The end of the war, he added, left a government *de facto* in full operation, "with the presumed consent of the people" until Congress should provide a government, and that such *de facto* government as existed must obey the Federal Constitution. No duties could be levied in California on articles imported from any State or Territory, nor could they be levied in any part of the country on the products of California. Secretary Root may argue that the ninth article of the Spanish treaty was intended, by the President and Senate, to make those precedents inapplicable to Puerto Rico and the Philippines. He must then contend with Marshall and Marcy.

After the ninth and tenth, the propositions seem to conflict with the previous ones, and especially with the third, which had affirmed that Congress in governing the natives of the Philippines will be "controlled by no legal limitations except those which may be found in the treaty of cession." The tenth declares that the natives are entitled to insist on three of the enumerated guarantees contained in the Constitution, because the United States has declared those guarantees to belong to everybody, because observance of them is a part of the nature of our Government, and because there is an implied contract that Congress will observe the three guarantees. When and where have those three been made "a part of the nature of our Government" to the exclusion of others? They are not specially referred to in the treaty. Why those, any more than guarantees against *ex post facto* laws, unwarranted trial and conviction for crime, juryless civil trials, and even uniform taxes and customs duties?

The Secretary of War seems confident that the recent treaty, and not the Constitution, is the test of the authority of Congress over Puerto Rico and the Philippines. He has perfect trust, no doubt, in the wisdom of the present Congress and of the President. Yet, he manifests an uneasiness over what a possible future Congress and President may do, if the islands be left exposed to legislation unrestrained by the Constitution. That he prefers to rely on the spirit and nature of our fundamental law rather than on its letter is perhaps immaterial provided the judicial power can, in a proper case, sit in judgment on whatever Congress may do. The essential thing is Constitutional control.

During the second quarter of the century just ending the opinion of the Supreme Court regarding the power of Congress over national possessions outside of States, whether Territories or dependencies, was affected by the slavery problem. In the Dred Scott case the "needful rules and regulations" clause of the Constitution was set aside as not applicable to possessions acquired by cession, and power to govern was, in that case, based on the power to acquire, accompanied by a denial of unrestricted right to rule over them as colonies or dependent provinces. After the War of Secession the "needful rules and regulations" clause was revived and the power of Congress to govern Territories was vested therein by the Supreme Court, but always subject to restrictions imposed by the Constitution.

PERRY BELMONT.